Supreme Court
FILED

01-31 JUL 06 2001

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

DIANE L. HOLBROOK,

Petitioner,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
A FOREIGN CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

DIANE L. HOLBROOK
P.O. Box 1512
Hobe Sound, Florida
33475-1512
(561) 545-9793
Petitioner Pro Se.

Washington, D.C. • THIEL PRESS • (202) 328-3388

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APPENDIX O

[Filed NOV 5 1999]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 98-14246-CIV-DAVIS

DIANE L. HOLBROOK,

Plaintiff,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION
FOR FINAL JUDGMENT (DE #34)

THIS CAUSE having come on to be heard upon the aforementioned Motion, and this Court having reviewed the Motion, Response, and the pertinent portions of the record, makes the following recommendation.

BACKGROUND

1. On August 28, 1998, Plaintiff, proceeding *pro se*, filed her complaint alleging breach of contract, bad faith and misrepresentation (DE #1). On December 16, 1998, Plaintiff filed an amended complaint (DE #3) and a summons was issued (DE #4).

2. On January 25, 1999, Defendant filed a Motion to Dismiss the original complaint for failing to serve Defendant within 120 days (DE #7).

3. The Defendant was served with the amended complaint on January 12, 1999 (DE #6 and #8). On February 2, 1999, Defendant filed a motion to extend time to serve its answer or a responsive motion to the amended complaint (DE #9). On February 3, 1999, Judge Davis granted Defendant's motion and extended the time to March 4, 1999 (DE #10).

4. On February 8, 1999, Plaintiff filed a motion for default judgment on the grounds that Defendant failed to respond to her amended complaint (DE #12 and #13). On February 12, 1999, Defendant filed a response to Plaintiff's motion (DE #14).

5. On February 22, 1999, Judge Davis denied as moot Defendant's Motion to Dismiss since Plaintiff filed an amended complaint, and denied Plaintiff's motion for default judgment because the Court granted Defendant an extension of time to March 4, 1999 to respond to the amended complaint (DE #15).

6. On March 4, 1999, Defendant filed a Motion to Dismiss, to Strike, and for More Definite Statement (DE #16).

7. On the same day, Plaintiff filed another motion for default judgment on the grounds that Defendant failed to file a response within the deadline imposed by Judge Davis' order of February 22, 1999 (DE #17). On March 19, 1999, Judge Davis denied Plaintiff's motion and noted that on the same day Plaintiff filed her motion, March 4, 1999, the Defendant filed a Motion to Dismiss that was within the deadline imposed by the Court (DE #18).

8. On April 7, 1999, Plaintiff filed an interlocutory appeal of the March 19, 1999 order with the Eleventh Circuit (DE #20).

9. On April 12, 1999, Judge Davis issued an order requiring Plaintiff to show cause why Defendant's Motion to Dismiss should not be granted for her failure to file a response to the motion (DE #22). On April 20, 1999, Plaintiff filed a response to the order to show cause (DE #25).

10. On April 26, 1999, Judge Davis granted Defendant's Motion to Dismiss concluding that Plaintiff's amended complaint failed to allege facts to allow the Court to conclude that it had diversity jurisdiction and failed to identify a number of claims Plaintiff was purporting to assert (DE #27). Judge Davis gave Plaintiff thirty (30) days to file a second amended complaint.

11. On May 18 and 21, 1999, Plaintiff filed a motion for extension of time (DE #31 and #29). The motions were identical. Plaintiff requested an extension of time to file her second amended complaint from May 26, 1999 to August 5, 1999.

12. On May 24, 1999, this Court denied Plaintiff's request for an extension for failure to show good cause (DE #30). On May 28, 1999, Judge Davis denied as moot Plaintiff's second motion for extension of time (DE #32).

13. On September 7, 1999, Plaintiff filed a Motion for Extension of Time for a Stay of Proceedings Pending Final Rulings of the Interlocutory Appeal (DE #35). On September 21, 1999 Defendant filed a response to the motion (DE #36).

14. On September 23, 1999, this Court denied Plaintiff's motion for stay for failure to set forth any cause

why the proceedings should be stayed or the time extended (DE #37).

15. On August 27, 1999, Defendant filed the instant motion for final judgment (DE #34). Defendant requests the court to enter a final judgment of dismissal with prejudice against Plaintiff for her failure to file a second amended complaint. On September 27, 1999, Plaintiff filed a response to the motion (DE #38).

16. On September 22, 1999, the Eleventh Circuit dismissed Plaintiff's appeal of the March 19, 1999 order as frivolous (DE #40).

DISCUSSION

Pursuant to Judge Davis' order of April 26, 1999, Plaintiff was required to file her second amended complaint on or before May 26, 1999. Instead, on May 18 and 21, 1999, Plaintiff filed a motion for extension of time. Plaintiff sought to extend the deadline from May 26 to August 5, 1999. The reasons for the request were that Plaintiff had been summoned for jury service for a two week period beginning June 21, 1999 and that she had previously filed, on April 13, 1999, a Notice of Vacation stating that she would be out of the state from May 10 through June 18, 1999.

This Court denied Plaintiff's motion for extension of time to file a second amended complaint for failing to show good cause for the extension. This Court notes that Plaintiff's jury duty was not set to begin until twenty-six (26) days after the May 26th deadline and Plaintiff's vacation period did not begin until two (2) weeks after Judge Davis' order imposing the deadline to file a second amended complaint. Furthermore, it was this Court's view that Plaintiff's request for a seventy-one day (71) day extension was unreasonable.

On August 27, 1999, over three (3) months after Plaintiff's second amended complaint was due to be filed, Defendant filed a Motion for Final Judgment. Defendant argues that Plaintiff has not filed a second amended complaint nor has she shown good cause for any extensions. Defendant asserts that the Court's order dismissing Plaintiff's complaint with leave to amend within a specified period became final when the time period allowed for the amendment expired. See, *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126 (11th Cir. 1994); *United States v. Garcia*, 844 F.2d 1528 (11th Cir. 1988); *Schuurman v. Motor Vessel Betty K V*, 798 F.2d 442 (11th Cir. 1986). This Court agrees.

This Court has reviewed Plaintiff's response to Defendant's Motion for Final Judgment, filed September 27, 1999, and finds it to be incomprehensible and unintelligible. This Court is not sure what Plaintiff is arguing except that it appears she is attempting to re-argue her Motion for Default Judgment and that her appeal of Judge Davis' order on that motion stays the proceedings in this Court, including the time to file her second amended complaint. This Court previously reviewed and rejected Plaintiff's argument on staying these proceedings pending her appeal to the Eleventh Circuit in her motion filed September 7, 1999.

This Court has completed a thorough review of the record and notes that Plaintiff never filed a second amended complaint. Judge Davis set the deadline for May 26, 1999 and Plaintiff failed to comply. Plaintiff even failed to file her second amended complaint 1) after this Court denied her motion to extend, 2) after this Court denied her motion to stay, or 3) after Defendant filed the instant motion for final judgment. Moreover, on September 22, 1999 the Eleventh Circuit dis-

missed Plaintiff's appeal as frivolous and today, some forty-four (44) days later, Plaintiff still has failed to file her second amended complaint.

CONCLUSION

ACCORDINGLY, this Court recommends to the District Court that Defendant's Motion for Final Judgment be GRANTED.

The parties shall have ten (10) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable Edward B. Davis, United States District Judge who has been assigned to try this case.

DONE AND SUBMITTED this 5th day of November, 1999, at Fort Pierce, Northern Division of the Southern District of Florida.

/s/ Frank J. Lynch, Jr.
FRANK J. LYNCH, JR.
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Edward B. Davis
Diane L. Holbrook, Pro Se
Eric N. Assouline, Esq.

APPENDIX P

[Filed NOV 15 1999]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

Case No. 98-14246-CIV-DAVIS
Magistrate Judge: Lynch

DIANE L. HOLBROOK,

Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
a FOREIGN CORPORATION,

Defendant.

OBJECTION TO MAGISTRATE JUDGE FRANK J. LYNCH, JR.'S REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION FOR FINAL JUDGMENT (DE #34)

PERTINENT to this report, this Court failed to mention about September 29, 1999 (DE #41) NOTICE of Filing Motion for Reconsideration and Clarification with the United States Court of Appeals. Furthermore:

BACKGROUND

1. Paragraph 2, Plaintiff served the Defendant on the 115th day being within 120 days allowable by law.

2. Paragraph 3, Clerical Error resulted into a chain reaction of occurrences on something that the Plaintiff should have received a Default Judgment against the Defendant. The District Court erred in calculating the 30 day extension date relying upon the Clerical Error. Furthermore, on August 27, 1999, the Defendant themself agreed on signed document on Paragraph 1 that the Defendant was served with the amended complaint on December 21, 1998 (DE #34). Both sides agree with the 115th day served upon Defendant and the Clerk, to this day pertinent to this report, have not corrected there mistake to properly issue the Default Judgment against the Defendant. Again, Magistrate Judge Frank J. Lynch, Jr. is obviously relying on this error as this Court has in the past. Recommendation for clerk to correct error and issue Default Judgment against Defendant to finally close case in Plaintiff's full favor.

3. Most of the remainder of Magistrate Judge Frank J. Lynch. Jr.'s Report and Recommendation on Defendant's Motion for Final Judgment (DE#34) is explained within attachments consisting of Plaintiff Diane L. Holbrook's Response in Opposition to Defendant, Nationwide Mutual Insurance Company, a Foreign Corporation's Motion for Final Judgment and Incorp. Memorandum of Law. These would also be part of my Objections to Magistrate Judge Frank J. Lynch. Jr.'s Report and Recommendation on Defendant's Motion for Final Judgment (DE #34) *as showing good cause reasoning for* why Plaintiff is entitle to her Default Judgment against Defendant. Plaintiff does not need a second amended complaint because:

a) Plaintiff's amended complaint shows allege facts to allow this Court to conclude that it had diversity jurisdiction by Paragraph 17 including Amended Motion For Judgment as part of the Amended Complaint.

b) Plaintiff's amended complaint does identify a number of claims Plaintiff was purporting to assert by Paragraph 17 including Amended Motion For Judgment with multiple exhibits as part of the Amended Complaint.

c) Therefore, there is no need pertinent to reasoning of the April 26, 1999 Order, of doing a second amended complaint because it is in there and this would mean starting over again (something the Defendant would love to happen).

Diane L. Holbrook, respectfully request this Court to enter Plaintiff's Motion for Default Judgment *or* to Court Order for Clerical corrections and entry of "Request To Clerk To Enter Default against Defendant". Plaintiff, Diane L. Holbrook respectfully requests that this Court deny Defendant's Motion for Final Judgment and such other relief as this Court finds just, fair and equitable.

Respectfully submitted,

/s/ Diane L. Holbrook
Diane L. Holbrook
P O Box 1512
Hobe Sound, Florida 33475-1512
Ph: 561-545-9793

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by certified mail this 13th day of November, 1999 to:

Eric N. Assouline Esq.
Raoul G. Cantero, III Esq.
Natalie Carlos Esq.
Adorno & Zeder, P.A.

2601 South Bayshore Drive, Suite 1600
Miami, Florida 33133
Ph: 305-858-5555

Attn: Intake Clerk
Clerk, United States District Court
300 South 6th Street
Fort Pierce, Florida 34950

Attn: Intake Clerk
Clerk, United States District Court
Federal Courthouse Square
301 North Miami, Florida 33128-7788

/s/ Diane L. Holbrook
Diane L. Holbrook

APPENDIX Q

[Filed DEC 6 1999]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

Case No. 98-14246-CIV-DAVIS
Magistrate Judge: Lynch

DIANE L. HOLBROOK,

Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
a FOREIGN CORPORATION,

Defendant.

PLAINTIFF, DIANE L. HOLBROOK'S RESPONSE TO DEFENDANT, NATIONWIDE'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION ON NATIONWIDE'S MOTION FOR FINAL JUDGMENT

Plaintiff, Diane L. Holbrook, hereby responds to the Defendant Nationwide Mutual Insurance Company, a Foreign Corporation ("Nationwide")'s response to Plaintiff's Objections to the Magistrate's Report and Recommendation on Defendant's Motion for Final Judgment as follows:

This Court should adopt, in its entirety, the Plaintiff's objections because the Magistrate's Report and Recommendation contains within its report uncorrected Clerical mistakes. See Rule 60 recommending that the Clerical mistakes be corrected and for the Clerk to issue Default Judgment against Defendant to finally close this case in Plaintiff's full favor. Further explained and backed by Documental Evidences as Exhibits shows good cause reasoning for why Plaintiff is entitle to her Default Judgment against Defendant because it also shows that the Plaintiff's amended complaint does identify a number of claims and shows allege facts to allow this Court to conclude that it had diversity jurisdiction. Therefore, there is no need pertinent to reasoning of doing a second amended complaint.

WHEREFORE, Plaintiff Diane L. Holbrook respectfully requests this Court acknowledge and to Court Order for Clerical corrections and entry of "Request to Clerk to Enter Default against Defendant". Plaintiff, Diane L. Holbrook respectfully requests that this Court deny Defendant's response of overruling Plaintiff's objection to the Magistrate's Report and Recommendation and also deny Nationwide's Motion for Final Judgment and such other relief as this court finds just, fair and proper.

Respectfully submitted,

/s/ Diane L. Holbrook
Diane L. Holbrook
P O Box 1512
Hobe Sound, Florida 33475-1512
Ph: 561-545-9793

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by certified mail this 4th day of December, 1999, to:

Eric N. Assouline Esq.
Raoul G. Cantero, III Esq.
Natalie Carlos Esq.
Adorno & Zeder, P.A.
2601 South Bayshore Drive, Suite 1600
Miami, Florida 33133
Ph: 305-858-5555

Attn: Intake Clerk
Clerk, United States District Court
300 South 6th Street
Fort Pierce, Florida 34950

Attn: Intake Clerk
Clerk, United States District Court
Federal Courthouse Square
301 North Miami Avenue
Miami, Florida 33128-7788

/s/ Diane L. Holbrook
Diane L. Holbrook

APPENDIX R

[Filed DEC 15 1999]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 98-14246-CIV-DAVIS/LYNCH

DIANE L. HOLBROOK,

Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendants.

ORDER

THIS MATTER is before the Court on the report of Magistrate Judge Lynch, recommending that this Court grant Defendant's Motion for Final Judgment [D.E. #34]. Plaintiff filed objections to the Magistrate Judge's report, Defendant responded to Plaintiff's objections, and Plaintiff filed a reply to Defendant's response to Plaintiff's objections. This Court has reviewed all the responsive papers and finds Plaintiff's objections to be without merit. For the reasons stated in the report of the Magistrate Judge, and upon independent review of the record, it is

ORDERED AND ADJUDGED that Defendant's Motion for Final Judgment in its favor is **GRANTED**; the Clerk shall **CLOSE THIS CASE**; and all motions not otherwise disposed of are hereby **DENIED AS MOOT.**

DONE AND ORDERED in Chambers in Miami, Florida, this 14th day of December, 1999.

/s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES DISTRICT JUDGE

cc: attached service list

Eric N. Assouline
Raoul Cantero, III
Natalie G. Carlos
ADORNO & ZEDER, P.A.
2601 South Bayshore Drive, Suite 1600
Miami, Florida 33133

Diane L. Holbrook
P.O. Box 1512
Hobe Sound, Florida 33475-1512

APPENDIX S

December 31, 1999

Diane L. Holbrook
P O Box 1512
Hobe Sound, Florida 33475-1512
Telephone: 561-545-9793

Attn: Eric N. Assouline, Esq./Raoul G. Cantero III, Esq./
ADORNO & ZEDER, P.A. Natalie J. Carlos, Esq.
2601 South Bayshore Drive, Suite 1600
Miami, Florida
Telephone: 305-858-5555

Dear Eric N. Assouline, Raoul G. Cantero III and Natalie J. Carlos

Pursuant to my telephone conferences of December 20th and December 21st, 1999 to Raoul G. Cantero III, Esq.'s private receptionist/secretary and Natalie J. Carlos, Esq.'s private receptionist/secretary relayed courtesy message of planning to Appeal Chief Judge Edward B. Davis's final ORDER. Also, left message for Eric N. Assouline, Esq. to call me back and left my phone number on his voice message box. None of the attorneys have called to object to my Appeal of this case. This is now written at the end of the day of December 31, 1999 being ten days after last attorney was notified by his own receptionist/secretary was called into.

If there are any questions concerning these matters, please feel free to contact me.

Sincerely Yours,

/s/ Diane L. Holbrook
Diane L. Holbrook

Enclosure
Copy of telephone Bill.